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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MICHAEL CHAPMAN,

Plaintiff and Appellant,

v.

SAFEWAY INC. etc. et al.,

Defendants and Respondents.

2d Civil No. B218227

(Super. Ct. No. 56-2008-00303146)

(Ventura County)

Michael Chapman appeals from a summary judgment granted in favor of respondents, Safeway Inc. and Vons, on his action for age discrimination and wrongful demotion. (Code Civ. Proc., § 437c.) The trial court ruled that appellant's demotion from store manager to food clerk was voluntary and for personal reasons, and that appellant could not make a prima facie showing of age discrimination under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.). We reverse. Triable facts exist on whether unfair job performance evaluations were used as a pretext to take unlawful adverse employment action against appellant and force him to take a demotion.

De Novo Review and the "McDonnell Douglas" Test

We review the grant of summary judgment de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) Summary judgment is proper where the moving papers conclusively negate a necessary element of the plaintiff's case or

demonstrate that, under no hypothesis, is there a material issue of fact that requires the process of trial. (*Ibid.*)

The Fair Employment and Housing Act (FEHA; Gov. Code, § 12940, subd (a)) makes it unlawful for an employer to terminate or demote an employee over the age of 40 because of age. California courts have adopted a three-stage-burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [36 L.Ed.2d 668] for trying age discrimination claims. (*Guz, supra*, 24 Cal.4th at p. 354.) "This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz, supra*, 24 Cal.4th at p. 354.)

Under the *McDonnell Douglas* test, the plaintiff must first establish a prima facie case of discrimination. (*Guz, supra*, 24 Cal.4th at pp. 354-355.) This raises a presumption of discrimination, shifting to the defendant-employer the burden of producing evidence that the termination or demotion was for a legitimate, nondiscriminatory reason. (*Id.*, at p. 355-356.) "If the employer sustains this burden, the presumption of discrimination disappears. [Citations.] The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. [Citations.] In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. [Citations.]" (*Id.*, at p. 356.)

"If, as here, the motion for summary judgment relies in whole or in part on a showing of nondiscriminatory reasons for the discharge [or demotion], the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination [or demotion]. [Citations.] To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred. [Citations.] In

determining whether these burdens were met, we must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing [his] evidence while strictly construing defendant's. [Citations.]" (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098.)

Facts and Procedural History

Appellant, a Vons employee for 35 years, was promoted to store manager at the Fillmore Vons store in March 2004. Before the promotion, appellant worked at other stores as store manager trainee, assistant store manager, and acting store manager, consistently receiving favorable job performance evaluations. As store manager, appellant received positive performance reviews and World Class Service awards in 2004. In 2005 and the first quarter of 2006, appellant's store ranked in the top third to the top half of District 42 which had 19 stores.

After the Southern California Retail Grocers' Strike was resolved in March 2004, new store employees (Tier 2) were paid less and received less benefits than pre-strike (Tier 1) employees who were generally older. Vons store managers attended a March 2004 management meeting and were told to leverage the union contract by cutting hours of Tier 1 employees and to put pressure on older Tier 1 employees to retire or quit. District Manager William Tarter, Director of Labor Scheduling Marc Albrent, and Vice President of Operations Larry Vanderdoes led the meeting.

Store Manager Richard Huber testified that they were told to "[w]eed out the darksiders and save the company millions." Huber explained that a "darksider pretty much was anybody who had worked for the company for any length of time, who was near the top of the pay scale." Store Manager Robert Morel stated that they were told "to make things so miserable for the experienced help that through attrition the new job class would completely take over."

In 2005, respondents allegedly implemented a policy and practice of pressuring older store managers to take demotions or early retirement. Store Manager John Wahlrab testified that older managers were transferred to low volume stores and subjected to increased scrutiny and inspections by upper management.

Appellant claims that he was targeted by upper management, that his store was inspected constantly (on one day three times), that his store was unfairly audited, and that respondents selectively enforced store policies and standards to elicit poor job performance reviews and pressure appellant to step down or quit.

In March 2006, District Manager Tarter counseled appellant about unsatisfactory job performance reviews and told appellant to submit a Personal Improvement Plan that would serve as a six-month action plan. A month after Tarter approved the action plan, he gave appellant an ultimatum to accept a demotion from store manager with a salary of \$75,00 per year or be fired. Appellant stepped down to retail food clerk, a job that paid \$37,000 per year. Appellant (age 54) was replaced by Kathy Lisle (age 48), a 25 year Vons employee. She was paid a higher wage than appellant received as store manager.

Appellant sued for violation of the Fair Employment and Housing Act (FEHA; Gov. Code, § 12940 et seq.), wrongful demotion, and on other tort theories.

Respondents moved for summary judgment based on undisputed facts that appellant received unsatisfactory performance evaluations in 2005 and 2006.

Respondents claimed that appellant requested the demotion and took the demotion for personal reasons.

The trial court ruled that the action was analogous to constructive discharge and required a showing that Vons created an intolerable working condition, forcing appellant to ask for a demotion. Summary judgment was granted on the ground that there were no triable facts that the job performance evaluations were used as a pretext to discriminate and no evidence that appellant was replaced by a significantly younger employee. As we shall explain, there was sufficient showing of pretext to survive a summary judgment motion.

Alleged Nondiscriminatory Reason: Job Performance Evaluations

Respondents argue that it is undisputed that appellant received unsatisfactory job performance evaluations and took the demotion for personal reasons. The summary judgment opposition papers paint a very different picture. Appellant

testified that the job performance reviews were biased and used as a pretext to force appellant to take a demotion. On March 22, 2006, Tarter approved appellant's six-month action plan, said that he would coach him, and that it was important that they meet and review appellant's progress every two weeks. Appellant was not given the opportunity to implement the action plan and stated that there were no progress meetings. Human Resources Representative Amy Sue Devine confirmed there were no records of an action plan progress meeting.

A month later, on April 20, 2006, Tarter gave appellant the ultimatum of demotion or termination. Appellant's account of the meeting is that Tarter said that appellant "was not the first" and that another store manager (Brad Scott) had "stepped down" that morning and "was offered an assistant manager's job, and you weren't. And I think you can figure out why." Appellant replied: "Yeah, I know, He's young, and I'm old." Tarter said: "Yeah, that's right." Brad Scott was in his 30's. Appellant stated that "After advising Bill Tarter that I would 'agree' to the demotion, I was forced to write a letter regarding my step-down."

Respondents argue that appellant's April 22, 2006 letter shows the demotion was voluntary. The letter states "as discussed on 04/21/06 with you [Tarter] and Amy Sue Devine, I will be stepping down to a Food Clerk position. This was not an easy decision, but I have always respected your opinion and supported you in any capacity. I will continue to do so in any position I work in."

The letter must be considered in light of appellant's declaration as to why he signed it. A triable issue of fact exists as to whatever appellant voluntarily stepped down in respect and support of Tarter's "opinion." It is consistent with appellant's testimony that Tarter discussed a demotion in February. Appellant rejected the "demotion offer" and prepared an action plan that Tarter rejected. After Tarter approved a revised action plan in March 2006, Tarter delivered the ultimatum on April 20, 2006. Appellant was supporting three children and eight months short of having his medical benefits fully vest. Tarter warned him that "[t]hings are not going to get better." Appellant was "pressured" to sign the letter and did not have the chance to fight it

because of "all the [store] visits and lists." Rather than be terminated, appellant took a demotion.

Respondents argue that appellant took the demotion because he was stressed about his wife leaving him. Appellant, however, stated that he and his wife separated two years before the demotion and that "[s]he wasn't involved in it." Wife, a Von's employee, was upset that appellant crossed the picket lines during the 2004 strike and that appellant's "priorities are Vons first and family second." Human Resources Representative Amy Sue Devine attended a February 2006 meeting at which Tarter discussed a demotion. Devine could not recall appellant saying anything about personal problems. Two store associates knew that appellant was going through a marital separation and testified that it did not affect his work performance. Richard Huber stated that appellant was very professional and "always giving a hundred percent or more at work."

Me Too Evidence

The trial court sustained objections to Store Manager Patrick Shelton's declaration which states that Shelton was targeted and put on a hit list based on his age. Respondents argue that appellant's and Shelton's declarations are irrelevant, lack foundation, and contain hearsay. The opposition papers, however, include the deposition testimony of appellant, Shelton, Richard Huber, and other store managers who declared that they were subjected to adverse employment action based on age. Huber worked for Vons for 25 years, did not have "a blemish on my record," and was pressured by Tarter to take a demotion. Huber said "[i]t was all about age and cost savings" and that management visited his store every day. On the Fourth of July weekend, Huber's store had record sales. Tarter visited the store, noticed that the inventory was sparse due to phenomenal sales, and told Huber "he had two weeks to turn this around or [he] wouldn't have a job." The next day Huber was offered a step down to receiving clerk, which Huber took "because I knew if I didn't I wouldn't have a job." Tarter told Huber to write a letter and helped him phrase it to say "I am willfully stepping down from my position as store manager and becoming receiving clerk."

Harry Haccke, Jr. was subjected to similar discriminatory treatment, was targeted as an older store manager, and was transferred to lower volume stores for no apparent reason and replaced by a younger store manager. When Haccke asked the district manager if the transfer was due to poor inventories or personnel problems, he was told that "shit happens."

Store Manager Michael Morel testified that he was also targeted and was subjected to intense store audits after the strike. The goal was to get rid of older workers because it was "cheaper."

Respondents argue that age had nothing to do with appellant's demotion and point out that store employees gave appellant substandard performance reviews. The opposition papers show that the evaluations were skewed because only 15 out of 47 employees responded and many disgruntled employees had grievances with the store's post-strike policies. Appellant received positive store manager performance reviews from Vice President of Operations Larry Vanderdoes and four World Class Service awards during the same period that Tarter gave appellant a negative evaluation. The company policy was to average the scores on certain store performance and management skill categories. Had that procedure been used to evaluate appellant, appellants' overall average job performance score would have been better than good. Tarter changed the scoring procedure and gave Chapman a "needs improvement" by weighing the category scores differently.

Admissibility of Me Too Evidence

The foregoing "me to" evidence circumstantially shows that appellant was subjected to unfair performance reviews. This raises a triable issue of fact concerning unlawful disparate treatment. (*Guz, supra*, 24 Cal.4th at p. 354.) The FEHA "protects an employee against unlawful discrimination with respect not only to so-called 'ultimate employment actions' such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adverse and materially affect an employee's job performance or opportunity for advancement in his or her career." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1053-1054.)

Respondents contend that the testimony of other store managers is irrelevant "me too" evidence. In *Sprint/United Management Company v. Mendelsohn* (2008) 552 U.S. ____ [170 L.Ed.2d 1], the United States Supreme Court held that "me too" evidence by similarly situated employees may show a pattern of discrimination. Relevancy "is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and the theory of the case." (*Id.*, at p. ____ [170 L.Ed.2d at p. 9].)

In California, "me too" evidence may be relevant to show discriminatory intent or motive and to cast doubt on an employer's stated reason for an adverse employment action. (Evid. Code, § 1101, subd. (b); *Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 760.) "While such evidence does not in itself prove a claim of discrimination [citation], '[it] tends to add "color" to the employer's decisionmaking process and to the influences behind the action taken with respect to the individual plaintiff.' [Citations.]" (*Cummings v. Standard Register Co.* (1st Cir. 2001) 265 F.3d 56, 63; see Chin, Cal. Practice Guide Employment Litigation (Rutter 2009) [¶] 19:1037, pp. 19-128.6 to 19-128.7.)

In *Johnson v. United Cerebral Palsy/Spastic Children's Foundation*, *supra*, 173 Cal.App.4th 760, plaintiff claimed that she was fired because she was pregnant. The employer moved for summary judgment. Plaintiff submitted declarations by former employees stating that they were fired after becoming pregnant, knew of someone who was fired after becoming pregnant, or resigned after the employer learned the employee was trying to become pregnant and pressured the employee to quit. (*Id.*, at p. 761-762.) The Court of Appeal held that the declarations were relevant and admissible. (*Id.*, at p. 766.) "Dissimilarities between the facts related in the other employees' declarations and the facts asserted by plaintiff with regard to her own case go to the weight of the evidence, not its admissibility." (*Id.*, at p. 767.)

Appellant's opposition papers include Shelton's declaration, appellant's deposition and declaration, and the depositions of other store managers who worked in District 42 under the supervision of District Manager Tarter. The store managers were all

over the age of 50 and claim they were scrutinized and subjected to adverse employment action because of their age. Shelton stated that "this happened to 11 of 19 managers in District 42" The declaration lists store manager names and ages and states: "Once Vons targeted an older, higher-paid manager, they place unattainable goals upon him, transferred key personnel out from under him, conducted endless audits on his store, and subjected him to other conditions in order to set him up for failure. This happened to me, and from my conversations with Michael Chapman, Richard Huber, John Wahlrab, and Ed Bennett, it happened to them as well. [¶] . . . All of these managers were replaced with younger, less-qualified managers and either at [a] lower rate of pay, less benefits, or under conditions which otherwise financially benefited the company. I was replaced by a younger less-qualified manager, Michele Brown, who as in her early-30s and earned a significantly lesser rate of pay."

Disregarding the store manager "conversations," Shelton's declaration is circumstantial evidence of intentional discrimination. Much of it is corroborated by the depositions of other store managers: Richard Huber John Wahlrab, Michael Morel, and Harry Haacke, Jr. This raises a triable issue of fact that respondents' stated reason for placing appellant on an action plan and "offering" a voluntary demotion was a pretext to unlawfully discriminate. (See e.g., *Johnson v. United Cerebral Palsy/Spastic Children's Foundation*, *supra*, 173 Cal.App.4th at pp. 760 & 767.)

Appellant stated that he had "not been given the opportunity to implement my Action Plan that had been approved by Tarter. [¶] . . . I felt pressured to accept the demotion because I was already implementing two action plans, had three district managers and specialists visiting my store, had been given an unfair review, was being subjected to increased scrutiny that younger managers were not being subjected to and because I needed the job and . . . [¶] I knew if I did not accept the demotion, I would be terminated."

Appellant's deposition, which was received into evidence, says much the same. Respondents' objections to the depositions were overruled. Like the trial court, we are required to consider all of the evidence and all the inferences reasonably deducible

from the evidence. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838-840.) "The trial court may not weigh the evidence in the manner of a fact finder to determine whose version is more likely true. [Citation.] . . . Nor may the trial court grant summary judgment for a defendant based simply on its opinion that plaintiff's claims are 'implausible,' if a reasonable factfinder could find for plaintiff on the evidence presented. [Citation.]" (*Id.*, at p. 840.)

Respondents argue that the inference can be made that there was no discriminatory animus because Tarter was the same supervisor who promoted appellant. Respondents claim that appellant was asked to make the store more profitable, that it was too stressful for appellant to deal with, and that appellant took the demotion for personal reasons. The complaint, however, alleges both intentional discrimination and disparate impact discrimination.¹ The question of whether appellant was wrongfully demoted and forced to signed a demotion letter is for a trier of fact to decide. Summary judgment may not be granted where there are conflicting inferences as to material facts. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 856.)

Appellant's Replacement

Respondents argue that appellant cannot establish a prima facie case of age discrimination because he was not replaced by a significantly younger worker. The argument is based on *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997 (*Hersant*), an age discrimination case which states that "it is impossible to make an exact, all-inclusive statement of the elements of a prima facie age discrimination case applicable in all situations. [Citations.] The general requirement is that the employee offer circumstantial evidence such that a reasonable inference of age discrimination

¹ " 'Disparate treatment' is *intentional* discrimination against one or more persons on prohibited grounds. [Citations.] Prohibited discrimination may also be found on a theory of 'disparate impact,' i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class. [Citations.]" [Citations.]" (*Guz, supra*, 24 Cal.4th at p. 354, fn. 20.)

arises. . . . [¶] In the context of the present case, a reasonable inference, that is, a prima facie case, of age discrimination arises when the employee shows (1) at the time of the adverse action he or she was 40 years of age or older, (2) an adverse employment action was taken against the employee, (3) at the time of the adverse action the employee was satisfactorily performing his or her job and (4) the employee was replaced in his position by a significantly younger person. [Citations.]" (*Id.*, at pp. 1002-1003, fn. omitted.)

The requirement that the employee be replaced by a significantly younger person is dicta. *Hersant* (age 52) was replaced by a man seven years younger, "a differential that could reasonably be described as 'significant.'" (*Id.*, at p. 1006.) Citing *O'Conner v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308 [134 L.Ed.2d 433], the *Hersant* court acknowledged that "it is not entirely clear that this last element is required as part of the employee's prima facie case. [Citations.] Given the manner in which we resolve this matter, it is not necessary we resolve the issue." (*Hersant, supra*, 57 Cal.App.4th at p. 1003, fn. 3.)

Appellant (age 54) was replaced by a person six years younger. Reasonable minds may differ on whether a six year age difference, as opposed to the seven year age difference in *Hersant* makes for a "significantly younger person." The trial court assumed that appellant's replacement was only two or four years younger and "that is one hurdle, - one you keep crashing into" and "you still haven't gotten over that one. There's no evidence . . . that your client was replaced by a significantly younger person"

We reject the argument that a six year age difference is a litmus test for age discrimination. (See *O'Conner v. Consolidated Coin Caterers Corporation, supra*, 517 U.S. at p. 312 [134 L.Ed.2d. at p. 439] [68 year old replaced by 75 year old may be "very thin evidence" to infer discriminatory animus].) "Courts have differed about the exact gap in age that is significant for purposes of a discriminatory inference. [Citations.]" (*Guz, supra*, 24 Cal.4th at p. 368.) "[A] FEHA age discrimination claim may lie where there is *other evidence* of discriminatory intent, e.g., employer remarks indicating anti-age bias. In such cases, the age of the replacement worker simply raises a question of

fact as to the employer's motives; it is not an absolute defense. [Citation.]" (Chin, Cal. Practice Guide, Employment Litigation, *supra*, [¶] 8:786, p. 8-82.10.)

Based on respondents' construction of FEHA, the selection of a person older than appellant as a replacement would be an absolute defense. A similar argument was made in *Bengal v. Canfield & Associates, Inc.* (2000) 78 Cal.App.4th 66 (*Bengal*). There, the trial court granted judgment notwithstanding the verdict based on the theory that plaintiff's replacement, an older worker in the same protected class, precluded, as a matter of law, the inference that plaintiff was terminated based upon age. (*Id.*, at p. 73.) The Court of Appeal reversed on the ground that other evidence supported the inference that plaintiff was terminated based upon her age. (*Id.*, at pp. 76-78.) The court noted that a jury could just as easily infer that the replacement (an older person) was hired to protect against an anticipated claim of age discrimination.² (*Id.*, at p. 76.)

Conclusion

Applying the four prong test set forth in *Guz*, *supra*, 24 Cal.4th at page 355, the evidence shows that appellant was over 40 years old and a protected class member, that appellant was performing competently as reflected by the service awards and pre-2005 job performance reviews, that appellant suffered an adverse employment action, and the circumstances of appellant's demotion suggest discriminatory motive and wrongful demotion. There are disputed facts that appellant was subjected to discriminatory store inspections and job performance evaluations and denied the opportunity to implement the

² The *Bengal* court cited *Wright v. Southland Corp.* (11th Cir. 1999) 187 F.3d 1287, to explain why an age inference may not be dispositive: " '[I]magine a situation in which a racist personnel manger for a corporation fires an employee because he is African American. Shortly thereafter, the racist personnel manager is replaced, and the previously terminated employee is replaced by another African American. Under these circumstances, the first individual would have been a victim of illegal discrimination, despite the fact that his replacement was of the same race.' (*Id.* at p. 1292.) As this example illustrates, to hold that evidence that an employee is replaced by an older person conclusively establishes the absence of age discrimination would provide an employer who had actually discriminated based upon age with an absolute defense." (*Id.*, at p. 74.)

action plan. Putting aside the statistics and anecdotal evidence that the company was on a mission to "weed out the darksiders," the case boils down to whether appellant was given an ultimatum and forced to write a letter requesting a demotion. That is for a trier of fact to decide, not for a trial court on summary judgment.³

The judgment (order granting summary judgment) is reversed. Appellant is awarded costs on appeal.

NOT FOR PUBLICATION.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

³ Respondents request that we affirm the order granting summary adjudication on the remaining causes of action. The request is denied. The trial court, however, did not rule on the motion for summary adjudication because "the other causes of action rise or fall" on the age discrimination claim. Summary judgment was granted on the ground that the causes of action for breach of implied in fact contract, breach of covenant of good faith and fair dealing, emotional distress, and unfair competition were barred by appellant's at-will employee status and workers' compensation exclusivity. (Lab. Code, §§ 3600, 3601.)

Glen Reiser, Judge
Superior Court County of Ventura

Daniels, Fine, Israel, Schonbuch & Lebovitz; Moses Lebovitz, Anna Lisa Knafo and Christopher Brady, for Appellant.

Bren K. Thomas, Steven M. Crass, Littler Mendelson, for Respondents.